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IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1489

PLASTILINE, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The National Labor Relations Board, (hereinafter called the Board), in its opposing brief in No. 71-1489 has presented certain factual aspects of this case in a manner which is misleading and incorrect when contrasted to the record as developed below. The Board in its opposing brief lays great stress upon the factual background of this case — in particular, the events which transpired subsequent to the April 12, 1970 rejection by the Company's employees of a previously agreed upon contract. This Reply Memorandum[1] is filed

[1] As used herein, Pet. App. refers to the Appendix to the Petition; A refers to the Appendix in the court below.

to correct factual misstatements made by the Board in its opposing brief and to clarify misleading factual statements in the Board's opposing brief.

The factual misstatements made by the Board in its opposing brief are as follows:

1. The Board's opposing brief at Page 4 states:

> "He indicated that the Company contemplated making changes in the employees' wages, hours, and employment conditions, but, before doing so, it wanted to know if the Union still represented the employees (Pet. App. 25; A. 23, 42-49)."

The above quotation from the Board's opposing brief refers to a May 25, 1970 letter sent by the Company's attorney to the Union's attorney (A. 234). The pertinent excerpt from the May 25, 1970 letter is as follows:

> "The Company would like to make certain changes in its wages, hours and working conditions but before doing so would like to know whether or not your organization desires to be advised of these changes and to negotiate in regard to them." (A. 234)

As the above excerpt illustrates, no mention was made in the May 25, 1970 letter of the Union's status. Rather, the Company was inquiring as to whether or not the Union desired to negotiate over certain proposed changes. The Board's statement that the Company wanted to know if the Union still represented the employees is simply not correct.[2]

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[2] It is apparent that the Board's version resulted from a reading of the Union's letter of June 1 and not the Company letter of May 25 (A. 234-235).

2. The Board's opposing brief at Page 4 also states:

> 'On June 1, the Union responded that it did, and requested a bargaining session on June 23 (Pet. App. 25; A. 235)."

The above quotation from the Board's opposing brief refers to the Union's letter of June 1, 1970. The complete text of the Union's letter is as follows:

> "The Union still represents the employees at Plastiline, Inc., and is desirous of negotiating relative to any changes in its wages, hours and working conditions.
>
> Please contact me and we will arrange to meet at a mutually convenient time." (A. 235)

As is clear from the letter and the record below, the Union in its June 1 letter never requested a bargaining session on June 23. The actual agreement to meet on June 23 was reached in a telephone conversation between Attorneys for the Company and the Union on June 18, 1970 and confirmed by a letter from the Company Attorney to the Union Attoney on that date (A. 236). The Board's opposing brief grossly distorts a material fact.[3]

3. The Board's opposing brief at Page 4 further states:

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[3] The Board's opposing brief conflicts with its brief to the Court of Appeals below — see Board's brief below, Page 7.

> "The Company refused at the meeting on June 23 to bargain about its two proposed changes in working conditions unless the Union proved its majority status or would agree to do so in the future (Pet. App. 26; A. 51-52)."

This statement in the Board's brief is totally without support in the record. Indeed, the citations in the Board's own brief to the record below indicate that at the June 23 meeting the Company attempted to negotiate over the proposed changes. The record below reflects that the Company Attorney explained the Company's proposed changes at the meeting (A. 262) and asked for the Union's comment on the changes (A. 263, 265, 271). The record below makes it quite clear that it was the Union who refused to comment on the proposed changes (A. 263, 265, 271).[4]

In addition to the factual misstatements detailed above, the Board's opposing brief contains the following misleading factual statements:

1. The Board's opposing brief at Page 4 states:

> "Thereafter, the Company informed the Union that it intended to file an election petition with the Board, but offered to continue bargaining if the Union showed that it had majority support (Pet. App. 28; A. 237-247)."

The above quotation refers to the Company attorney's letter of July 9, 1970 addressed to the Union attorney. The pertinent portion of the July 9 letter is as follows:

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[4] Again, the Board's version conflicts with its brief to the Court of Appeals below — see Board's brief below, Page 8.

> "In accordance with your request at the meeting held on June 23, 1970, we wish to advise you that it is the Company's intention to file, as stated at that meeting, a Petition for Certification. Therefore, we are in the process of getting evidence to support that Petition, and it will be filed at an early date.
>
> Although we do not believe that your client continues to represent a majority of the employees of Plastiline, Inc., in the unit for which your client was certified over a year ago, we further wish to advise you that we are prepared to negotiate in good faith with your client in an attempt to reach a contract in accordance with the law. We also must advise you, however, that any agreement reached must be conditioned upon your demonstrating to us prior to the execution of such agreement that your client, in fact, represents a majority of employees at Plastiline, Inc." (A. 237)

As the above portion of the July 9, 1970 letter indicates, the Company stated that it would negotiate to a full agreement conditioning the execution of the agreement upon the Union's proof of majority status. This must be contrasted to the Board's opposing brief which states that the Company offered to continue to bargain with the Union if it proved its majority status. The Board's version is patently misleading and finds no support in the record (A. 237). Indeed, the statement of facts in the Board's opposing brief is contrary to the statement of facts in the Board's brief to the Court of Appeals below.[5]

2. The Board's opposing brief at Page 3 states:

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[5] See the Board's brief below, Page 9.

(A. 208). The Union had previously been informed at the outset of the negotiations that the Company attorney, Alley, was the only individual authorized to negotiate a contract for the Company and that all arrangements for collective bargaining such as scheduling meetings were to be made through Alley (A. 332). In light of Goode's request, the Company attorney was contacted and upon being informed of the request reluctantly gave his approval to the proposed meeting but stressed that the employees be notified that the meeting was in no way to be construed as an official negotiating session since the Company's chief spokesman would not be present (A. 333). In addition, it was known to the Company that the authority of Goode to negotiate was limited — to be exercised only through an International Union Representative (A. 144). The meeting was held on April 17, 1970. At the conclusion of the meeting, the Company President stated that the items discussed would be taken under advisement by the Company (A. 217). Company officials then contacted attorney Alley and informed him of the results of the meeting (A. 334). In view of the prior understanding as to the nature of the meeting, Alley advised the Company to wait until contacted officially by the Union (A. 334). Alley felt that the Union, as in the past, would contact him for negotiations if the Union so desired (A. 334). The Board's opposing brief in its statement of facts intimates that the Company was attempting to forestall negotiations by refusing to construe the April 17, 1970 meeting as a negotiating session and by further refusing to contact the Union after the meeting. However, as indicated above, the Company had ample reasons for not considering the

April 17 meeting a negotiating session in that the absence of attorney Alley, the chief negotiator for the Company and the absence of Union representatives supported the Company's view that the meeting was simply a meeting between Company officials and employees to discuss why the contract was rejected by the employees (Pet. App. 23).

4. The Board's opposing brief at Page 3 states:

> "On May 25, 1970 — 12 days after the expiration of the certification year — the Company's attorney advised the Union's attorney that he had learned only that day of the employees' rejection of the contract."

This statement in the Board's opposing brief leaves the impression that the Company attorney had learned only on May 25, 1970, of the employees' rejection of the contract on April 12, 1970. Such an inference is both unfounded and illogical. The Board has seized upon the first paragraph of the Company attorney's letter of May 25, 1970, and has construed it out of context. The first paragraph of the letter is as follows:

> "I was very sorry to learn today that the union was not going to execute the contract which the negotiators had agreed to during the course of collective bargaining because the union membership had rejected the contract." (A. 234)

The Board's statement of facts is misleading in view of the evidence in the record that the Company's attorney was under the impression that the Union, despite the adverse employee vote, might still execute the contract (A. 332, 333). The Company's attorney had learned that the Union was not

going to execute the contract in a May 25 telephone conversation with the Union attorney and the letter of May 25 makes note of same. The Company attorney's letter of May 25 mentions execution, not rejection, of the contract and when so viewed is consistent with the Company's previous understanding regarding the execution of the contract.

5. The Board's opposing brief at Page 4 states:

> "The Company stated that the meeting's sole purpose was to discuss the proposed changes and refused to bargain or set a date for a further meeting (Pet. App. 26; A. 258-265, 275-278), asserting that it had evidence that the Union no longer had majority support (Pet. App. 26; A. 256, 259, 273)."

The Board's version is misleading. The Company was willing and attempted to negotiate over its proposed changes (A. 271). The Company indicated at the June 23 meeting that it was declining to set a date for future meetings because the Company attorney did not have his calendar with him (A. 276). However, at the end of the meeting, the Company's attorney, promised to contact the Union relative to future negotiations over a contract (A. 278). Consistent with this promise, the Company's attorney contacted the Union attorney by letter of July 9, 1970, and stated that the Company wanted the Union's contract proposals and suggested that the Union submit dates and times so that collective bargaining could take place (A. 237). Thus, the Board's statement indicating that the Company refused to bargain or set dates for further meetings is misleading when the record as a whole is consid-

ered. Indeed, the Company through its attorney's letter of July 9, indicated its willingness to bargain and to set future meeting dates (A. 237).

In conclusion, the factual inaccuracies in the Board's opposing brief should not be allowed to deter this Court from considering the importance and substantiality of the question raised by Petitioner.

Respectfully submitted,

Counsel for Petitioner

CERTIORARI DENIED